BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
AND THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.24.132, 17.24.133, 17.24.134, 17.24.136, 17.24.1206, 17.24.1211, 17.24.1218, 17.24.1219, 17.24.1220, 17.56.101 and the repeal of 17.24.1212 pertaining to revising enforcement procedures under the Montana Strip and Underground Mine Reclamation Act, the Metal Mine Reclamation Laws and the Opencut Mining Act, and the amendment of ARM 17.30.2001, and 17.30.2003, repeal of 17.30.2005, 17.30.2006 and 17.38.606 and the adoption of new rules I through VII pertaining to providing uniform factors for determining penalties	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT, REPEAL AND ADOPTION (AIR QUALITY) (ASBESTOS) (HAZARDOUS WASTE) (JUNK VEHICLES) (MAJOR FACILTITY SITING) (METAL MINE RECLAMATION) (OPENCUT MINING) (PUBLIC WATER SUPPLY) (SEPTIC PUMPERS) (SOLID WASTE) (STRIP AND UNDERGROUND MINE RECLAMATION) (SUBDIVISIONS) (UNDERGROUND STORAGE TANKS) (WATER QUALITY)

TO: All Concerned Persons

1. On _____, 2006, at _____ __.m., the Board of Environmental Review and the Department of Environmental Quality will hold a public hearing at [address], Montana, to consider the proposed amendment, repeal and adoption of the above-stated rules.

2. The Board and Department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., _____, 2005, to advise us of the nature of the accommodation that you need. Please contact the Board Secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386; or email ber@mt.gov.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

17.24.132 ENFORCEMENT: PROCESSING OF VIOLATIONS AND PENALTIES (1) Except as provided in (4) ~~of this rule~~, the department shall ~~issue a notice of violation, if~~ send a violation letter for a violation of the Act, this subchapter, or the permit, license, or exclusion ~~is identified as a result of any inspection~~. The ~~notice~~ violation letter must be served and

must state that the alleged violator~~,~~ may, by filing a written response within 15 days of receipt of the notice, provide facts to be considered in further assessing whether a violation occurred and in assessing the penalty under (2).

(2) ~~Within 30 days after issuance of the notice of violation, the department shall serve a statement of proposed penalty.~~ The department may issue a notice of violation and administrative order for a violation identified in a violation letter. The administrative order may assess a penalty, require corrective action, or both.

(3) The ~~person~~ alleged violator may, within ~~20~~ 30 days of service of the ~~statement of proposed penalty~~ notice of violation and order, respond in writing ~~to the statement~~ and may request an informal conference, a contested case hearing, or both, on the issues of whether the violation occurred, whether the ~~abatement~~ corrective action ordered by the department is reasonable, and whether the penalty ~~proposed to be~~ assessed is proper.

~~(4) Whenever an authorized representative of the department observes a minor violation that clearly does not represent a potential harm to public health, public safety, or the environment and clearly does not impair administration of the Act or this subchapter, the representative may issue a violation letter to the person. The violation letter must describe the violation and how the violation can be corrected. If, within 10 days, the violation has been corrected, the department shall waive the imposition of penalty. If the violation is not corrected within 10 days, the department shall issue a notice of violation pursuant to (1) of this rule.~~

~~(5)~~ (4) If a contested case hearing has not been requested~~, the department shall make findings of fact, issue a written decision, and order payment of any penalty as provided in 82-4-361, MCA~~ within 30 days of the date of service of the order, the notice of violation and order become final. If a contested case hearing has been requested, the ~~department~~ board shall hold a hearing~~;~~, make the findings of fact~~;~~, issue the decision~~;~~, and, if a violation is found, order payment of any penalty~~,~~ as provided in 82-4-361, MCA.

AUTH: 82-4-321, MCA
IMP: 82-4-337, 82-4-339, 82-4-361, MCA

REASON: The proposed amendments to (1) and (2) conform the rule to HB 428 by requiring the Department to issue a violation letter for all violations and giving the Department the discretion to issue an administrative order that may assess a penalty and/or require corrective action. The amendment to (1) also deletes the requirement that a violation be documented by an inspection. This requirement is unnecessarily excludes violations that may be discovered during the Department's review of records and is inconsistent with HB 428.

The proposed amendment to (3) extends the time within which a person charged with a violation has to request a contested case hearing from 20 to 30 days to be consistent with the time

within which a request for a contested case hearing must be made under HB 428. The amendment to (3) also replaces the word "abatement" with the phrase "corrective action" to reflect HB 428's change in terminology.

The proposed amendment deletes (4) because it is redundant to (1) and (2) as amended.

Finally, the proposed amendment to (5) reflects the streamlined enforcement procedure of HB 428. Rather than a two-step process requiring the Department to issue a notice of violation followed by findings of fact and conclusions of law, the Department issues an order that becomes final as a matter of law unless the alleged violator requests a contested case hearing within 30 days of service of the order.

17.24.133 ENFORCEMENT: ABATEMENT OF VIOLATIONS AND PERMIT SUSPENSION ~~(1) Except when the violation has already been abated, the department shall issue an abatement order with any notice of violation or suspension order.~~

~~(2) The abatement order shall require mitigation of the effects of the activity for which the notice or order was issued.~~

~~(3) Each abatement order shall identify a time frame for completion and may be extended only if the violator documents good cause for extension and the department finds in writing that good cause exists.~~

~~(4) Within 30 days of notification by a violator that an abatement order has been satisfied, the department shall inspect or review the abatement and determine whether or not the abatement order has been satisfied. The department shall notify the violator of its determination.~~

(5) through (6)(c) remain the same, but are renumbered (1) through (2)(c).

AUTH: 82-4-321, MCA
IMP: 82-4-357, 82-4-361, 82-4-362, MCA

REASON: The proposed amendment deletes (1) through (4), which govern the Department's issuance of abatement orders, and which are unnecessary given the enactment of HB 428. HB 428 amends the Metal Mine Reclamation Act to authorize the Department to require a violator to take necessary corrective action within a reasonable period of time to abate the violation.

17.24.134 ENFORCEMENT: ASSESSMENT AND WAIVER OF PENALTIES

(1) The department shall consider the ~~following~~ factors identified in 82-4-1000, MCA, in determining ~~whether to institute an administrative civil penalty action and in determining~~ the amount of a penalty for ~~the~~ a violation~~:~~.

~~(a) the nature, extent and gravity of the violation. The nature of the violation must be characterized as either actually or potentially resulting in harm to public health or safety, the environment, or as impairing the department's administration of the Act. This penalty must be determined as follows:~~

~~(i) If the violation created a situation in which the health or safety of the public or the environment was or could have been harmed, up to $1,000 may be assessed, depending upon the extent and gravity of such harm. If the violation created an imminent danger to the health or safety of the public or caused significant actual environmental harm, as documented by the department, up to $5,000 may be assessed.~~

~~(ii) In the case of a violation of an administrative requirement up to $1,000 may be assessed depending on the extent and gravity of the violation. Violation of an administrative requirement does not involve actual or potential harm to public health, safety, or the environment.~~

~~(b) the degree of negligent or willful conduct involved, if any. In addition to the amount assessed under (1)(a), a violation involving negligent or willful conduct on the part of the violator may be assessed up to $500 depending on the degree of negligence.~~

~~(c) the violator's recent history of prior violations. In addition to the amounts assessed under (1)(a) and (1)(b), $50 may be assessed for each notice of violation issued in the last 3 years; $250 may be assessed for each suspension order issued in the last 3 years. A notice of violation or suspension order that is not resolved or that has been vacated must not be counted.~~

~~(d) The department shall consider any voluntary mitigation by the violator. If the violator takes measures beyond those required by law to address or mitigate the violation or its impacts, up to $200 may be deducted from the total penalty assessed depending on the amount of time, money, or effort voluntarily expended and the degree of success. This includes mitigating the violation before the time set in the abatement order. No amount may be deducted for corrective action conducted by the violator in a merely adequate manner pursuant to a department permit, notice or order.~~

~~(2) Notwithstanding the provisions of (1)(a) through (1)(d), the department may not assess a penalty that is less than $100 or more than $1,000 except that for a violation that created an imminent danger to the health and safety of the public, the maximum penalty is $5,000.~~

~~(3) In addition to the penalty for the violation, the department may assess a penalty for each day on which the practice or condition constituting the violation continues. The penalty for each day must be equal to the penalty for the violation.~~

~~(4) Using the best information reasonably available to it at the time of calculating the penalties, the department shall determine any economic benefit or savings that the violator gained as a result of the violation. If the amount of penalties calculated pursuant to (1) through (3) is less than the economic benefit or savings, the department may increase the penalty to compensate for all or a portion of the economic benefit not exceeding the total maximum penalties for the violation and days of violation assessable under (2).~~

~~(5) If the violator is unable to immediately pay the full~~

~~penalty amount, the department may place the violator on a payment schedule with interest on the unpaid balance at the rate assessed by the Montana department of revenue on income tax due. The department may secure the payment schedule with a promissory note, collateral, or both.~~

~~(6) The department may waive or modify the penalty if it finds the penalty demonstrably unjust or demonstrably inadequate as a deterrent. The department shall set forth the basis for waiver or modification in writing including the consideration of any other matters that justice may require in addition to those factors described in this rule. The department may not waive or reduce the penalty for the sole reason that a reduction in the penalty could be used to offset the costs of abatement.~~

AUTH: 82-4-321, 82-4-361, MCA
IMP: 82-4-361, MCA

REASON: The proposed amendment to (1) deletes the factors for determining whether to institute an administrative civil penalty action. Those factors are currently set forth in 82-4-361, MCA, and need not be repeated in administrative rule. In determining the amount of a penalty, the proposed amendment to (1) replaces the penalty factors currently specified by administrative rule with a reference to the penalty factors set forth in 82-4-1002, MCA, reflecting the enactment of HB 429. HB 429 standardized the factors that are used to calculate penalties for violations of environmental laws.

Sections (2) and (3) pertaining to penalty parameters are proposed for deletion. The minimum and maximum penalties, an exception to the maximum penalty for a violation creating an imminent danger or causing significant environmental harm, and the imposition of daily penalties, are currently addressed in 82-4-361(1), MCA, and need not be repeated in administrative rule.

Section (4), which allowed the Department, when determining the penalty, to consider the economic benefit derived by a violator in committing the violation, is proposed for deletion. Section 82-4-1001(1)(d), MCA, enacted by HB 429, specifically provides economic benefit as a penalty factor, rendering (4) unnecessary.

Section (5) is proposed for deletion because a provision for allowing the payment of a penalty according to a payment schedule is set forth in 82-4-1001(2), MCA, as enacted by HB 429.

The proposed amendment to (6) deletes the provision allowing for waiver or modification of a penalty because the penalty is demonstrably unjust or demonstrably inadequate as a deterrent. That provision is no longer necessary because the Department has that discretion under HB 429. Section 82-4-1001(1), MCA, requires the Department to take into consideration "other matters that justice may require" in determining the amount of a penalty. The proposed amendment also deletes the provision prohibiting the Department from waiving or reducing a penalty in order to offset the costs of abatement, because that

prohibition was codified in statute by enactment of HB 429. Section 82-4-1001(1)(f), MCA, allows the Department to consider only the amount spent by the violator beyond that necessary to abate the violation.

17.24.136 ~~NOTICES AND~~ ORDERS: ISSUANCE AND SERVICE

(1) ~~A notice of violation, statement of proposed penalty, or an abatement, suspension, or revocation order, an order to reclaim, and other orders~~ Orders issued pursuant to the Act must be served upon the person to whom it is directed promptly after issuance by:

(a) delivering a copy of the ~~notice, statement or~~ order in person to the violator; or

(b) sending a copy of the ~~notice, statement or~~ order by certified mail to the violator at the address on the violator's application for a license or permit or exclusion.

(2) Service is complete upon tender of the ~~notice, statement or~~ order in person. Service by mail is complete ~~upon deposit in the U.S. mail, certified, postage prepaid, as set forth above~~ within three business days after the date of mailing and is not incomplete because of refusal to accept.

AUTH: 82-4-321, MCA
IMP: 82-4-341, 82-4-357, 82-4-361, 82-4-362, MCA

REASON: The proposed amendment replaces the references to "notice of violation," "statement of proposed penalty," "abatement order," "suspension order," "revocation order," and/or "order of abatement" in (1) and (2) with the term "order." This amendment reflects the enactment of HB 428 which authorizes the Department to issue an "order" specifying the factual and legal basis for the violation, the penalty, and any necessary corrective action rather than issuing a notice of violation, a statement of proposed penalty, and abatement order. The amendment also uses the term "order" to be inclusive of suspension or revocation orders, orders to reclaim, and any other order issued by the Department.

The amendment to (2) also provides that service of an order is completed within three business days after the date of mailing rather than upon the date of mailing to be consistent with HB 428.

17.24.1206 NOTICES, ORDERS OF ABATEMENT AND CESSATION ORDERS: ISSUANCE AND SERVICE (1) remains the same.

(2) A notice of noncompliance, notice of violation, ~~and statement of proposed~~ penalty order, or cessation order must be served upon the person to whom it is directed or his designated agent promptly after issuance by:

(a) through (5)(e) remain the same.

AUTH: 82-4-204, MCA
IMP: 82-4-251, MCA

REASON: The proposed amendment to (2) implements HB 428. Under HB 428, the Department is required to issue a penalty order that may become final by operation of law rather than a statement of proposed penalty.

17.24.1211 PROCEDURE FOR ASSESSMENT AND WAIVER OF CIVIL PENALTIES (1) remains the same.

(2) Within ~~30~~ 90 days after issuance of the notice of noncompliance, the department shall serve a notice of violation and ~~proposed~~ penalty order or notice of violation and waiver of penalty. Failure to serve the notice of violation and proposed penalty within ~~30~~ 90 days is not grounds for dismissal of the penalty unless the person against whom the penalty is assessed demonstrates actual prejudice resulting from the delay and makes objection in the normal course of administrative review. If the notice of violation and ~~proposed~~ penalty order is tendered by mail at the address of the person, as set forth in the permit in case of a permittee, and he or she refuses to accept delivery of or to collect such mail, service is completed upon such tender. In order to contest the fact of violation or the amount of penalty, the person charged with the violation must file a written request for hearing to the board of environmental review within ~~20~~ 30 days of service of the notice of violation and ~~proposed~~ penalty order. The hearing must be a contested case hearing in accordance with 82-4-206, MCA. If the department vacates the notice of violation, it shall also vacate the notice of noncompliance. At any time after issuance of the notice of violation and ~~proposed~~ penalty order and before commencement of the hearing, or, if a hearing is not requested, before ~~issuance of findings of fact, conclusions of law, and order~~ the notice and order become final, the person may confer with the department regarding the proposed penalty. ~~After the hearing or, if a hearing is not requested, after the 20-day request period has expired, the department shall issue its findings of fact, conclusions of law, and order.~~

(3) The department shall determine the civil penalty in accordance with ~~the point system in ARM 17.24.1212(2)~~ 82-4-1001, MCA. ~~However, the department may waive the point system if it finds that exceptional factors make use of the point system demonstrably unjust or demonstrably inadequate as a deterrent. The department shall set forth the basis for waiver in writing. The department may not waive use of the point system or reduce the penalty on the basis that a reduction in the penalty could be used to offset the costs of abatement. If the department waives the use of the point system, it shall use the criteria listed in ARM 17.24.1212(1), but not the points attributable thereto, to determine the amount of penalty.~~

(4) The violation is minor and the civil penalty may be waived if ~~under ARM 17.24.1212 it receives no points for seriousness and a total of 14 points or less before reduction for good faith~~ a consideration of the penalty factors set forth in 82-4-1001, MCA, demonstrates that the violation is not of potential harm to public health, public safety, or the environment and does not impair the administration of the Act.

The department shall set forth the basis for waiving the penalty in writing. The department may not waive the penalty on the basis that the waiver could be used to offset the costs of abatement.

AUTH: 82-4-204, 82-4-254, MCA
IMP: 82-4-254, MCA

REASON: The proposed amendment to (2) makes a number of modifications to implement HB 428. First, the proposed amendment replaces "statement of proposed penalty" with "penalty order" because the Department is required to issue a penalty order rather than a statement of proposed penalty under HB 428. Additionally, the proposed amendment extends the time within which a person charged with a violation has to request a contested case hearing from 20 to 30 days to be consistent with the time within which a request for a contested case hearing must be made under HB 428. Furthermore, the proposed amendment provides that the person charged with a violation may enter into settlement negotiations with the Department prior to the notice and order becoming final rather than the Department's issuance of findings of fact, conclusions of law and order. Under HB 428, the notice and order become final by operation of law if a request for a hearing is not received, obviating the need for the Department to issue findings of fact, conclusions of law and order. Finally, the proposed amendment deletes the requirement that the Department issue findings of fact, conclusions of law and order either after the hearing or after the period of requesting a hearing has expired. As previously indicated, a notice and order issued under HB 428 becomes final by operation of law if a request for hearing is not received. Thus, there is no need for the Department to issue findings of fact, conclusions of law and order. The requirement that findings of fact, conclusions of law and order be issued following a hearing is set forth in HB 428 and, thus, does not need to be repeated in this rule.

The proposed amendment to (2) also allows the Department 90 days, rather than 30, to serve the notice of violation and penalty order following issuance of the notice of noncompliance. In practice, 30 days has proven to be an insufficient amount of time within which to issue a notice of violation. In order to be consistent with federal regulations, an alleged violator is afforded an opportunity to submit to the Department's Coal Program a statement of mitigating circumstances regarding the occurrence of the violation and the assessment of the proposed penalty. The Coal Program then reviews and responds in writing to the statement of proposed circumstances. The Enforcement Division takes into consideration the letter of mitigating circumstances and the Coal Program's response to the letter of mitigating circumstances in issuing the notice of violation and in calculating the proposed penalty. Given the time it takes for the alleged violator to submit a letter of mitigating circumstances and for the Coal Program to review and respond in writing, it is not possible for the Enforcement Program to issue

a notice of violation and penalty order within 30 days of the issuance of the notice of noncompliance without a noncommensurate commitment of resources.

The proposed amendment to (3) provides that penalties are to be calculated pursuant to 82-4-1001, MCA, a statute enacted under HB 429, rather than ARM 17.24.1212(2). ARM 17.24.1212 is being repealed because its method of penalty calculation is inconsistent with HB 429, which standardized the penalty factors that are considered for violations of environmental laws.

The proposed amendment also deletes the provision allowing for the waiver of the penalty calculation from (3) and moves it, with modifications, to (4). Section (4) is a more appropriate section for the waiver provisions because it specifically addresses minor violations. The waiver provision is modified to provide that a decision to waive a penalty must be based on whether the violation presents potential harm to public health, public safety, or the environment, or impairs the Department's administration of the Opencut Act rather than on the assignment of points under ARM 17.24.1212(2). This amendment is necessary because the point system under ARM 17.24.1212(2) is inconsistent with HB 429 and is being repealed. Requiring a violation to be of no potential harm to the environment and to not impair administration of the Opencut Act assures that the violation is sufficiently minor to warrant waiver of a penalty and is comparable to the threshold for waiving a penalty previously set forth in (3) based on a point assessment under ARM 17.24.1212(2). The waiver provision in (4) retains the requirements previously set forth in (3) that the Department document the reason for waiving the penalty in writing and that the reason cannot be to offset the costs of abatement.

17.24.1218 INDIVIDUAL CIVIL PENALTIES: AMOUNT (1) In determining the amount of an individual civil penalty assessed under ARM 17.24.1217, the department shall consider the criteria specified in ~~ARM 17.24.1212~~ 82-4-1001, MCA, including:

(a) through (c) remain the same.

(d) remains the same, but is renumbered (2).

AUTH: 82-4-205, MCA
IMP: 82-4-254, MCA

REASON: The proposed amendment to (1) provides that penalties are to be calculated pursuant to 82-4-1001, MCA, a statute enacted under HB 429, rather than ARM 17.24.1212(2). HB 429 standardized the penalty factors that are considered for violations of environmental laws. ARM 17.24.1212 is being repealed because its method of penalty calculation is inconsistent with HB 429.

17.24.1219 INDIVIDUAL CIVIL PENALTIES: PROCEDURE FOR ASSESSMENT (1) The department shall serve on each individual to be assessed an individual civil penalty ~~and~~ a notice of ~~proposed individual civil penalty assessment, including a narrative explanation of the reasons for the penalty, the amount~~

~~to be assessed, and a copy of any underlying notice of violation and cessation order~~ violation and penalty order.

(2) The notice of ~~proposed individual civil penalty assessment becomes~~ violation and penalty order become a final order ~~20~~ 30 days after service upon the individual unless:

(a) the individual files within ~~20~~ 30 days of service of the notice of ~~proposed individual civil penalty assessment~~ violation and penalty order a request for hearing pursuant to 82-4-254(3), MCA; or

(b) through (4) remain the same.

AUTH: 82-4-204, MCA
IMP: 82-4-254, MCA

REASON: The proposed amendments to (1) and (2) require the Department to serve a notice of violation and penalty order on an individual being assessed an individual civil penalty rather than a notice of violation and notice of proposed individual civil penalty assessment. This amendment reflects enactment of HB 428. Under HB 428, the Department is required to issue a penalty order rather than a statement of proposed penalty.

The proposed amendment to (1) also deletes the requirement that the penalty document give an explanation for the penalty as well as its amount. These requirements are set forth in 82-4-254(3)(a) and 82-4-1001, MCA. It is, therefore, unnecessary to impose these requirements by administrative rule.

In addition, the proposed amendments to (2) extend the time within which an individual being assessed an individual civil penalty must request a hearing, from 20 days to 30 days. This amendment reflects the enactment of HB 428. Under HB 428, an operator has 30 days to request a hearing following receipt of a notice of violation and penalty order.

17.24.1220 INDIVIDUAL CIVIL PENALTIES: PAYMENT (1) If a notice of ~~proposed individual civil penalty assessment becomes~~ violation and penalty order become ~~a~~ final ~~order~~ in the absence of a request for hearing ~~or abatement agreement~~, the penalty is due ~~upon issuance of the final order~~ within 30 days after the expiration of the period for requesting a hearing.

(2) If an individual named in a notice of ~~proposed individual civil penalty assessment~~ violation and penalty order files a request for hearing, the penalty is due ~~upon issuance~~ within 30 days after the issuance of a final administrative order affirming, increasing, or decreasing the proposed penalty, unless enforcement of the order is stayed pursuant to 2-4-702, MCA.

(3) If the department and the corporate permittee or individual have agreed in writing on a plan for the abatement of ~~or compliance with the unabated order~~ the violation, the individual named in ~~a~~ the notice of ~~proposed individual civil penalty assessment~~ violation and penalty order may postpone payment until receiving either a final order stating that the penalty is due on the date of the final order or a written

notice that abatement ~~or compliance~~ is satisfactory and the penalty has been withdrawn.

(4) through (8) remain the same.

AUTH: 82-4-204, 82-4-205, MCA
IMP: 82-4-254, MCA

REASON: The proposed amendments to (1), (2) and (3) replace the term "notice of proposed individual civil penalty assessment" with "notice of violation and penalty order" to reflect HB 428. HB 428 requires the Department to issue a penalty order rather than a statement of proposed penalty.

The proposed amendments to (1) and (2) also require the payment of a penalty within 30 days after the expiration of the period for requesting a hearing rather than upon issuance of the final order. Pursuant to HB 428, the notice of violation and penalty order become final by operation of law if a request for hearing is not timely made. In this instance, there is no final order. Therefore, the deadline for paying the penalty had to be keyed off of the expiration of the period for requesting a hearing rather than the issuance of a final order.

Section (3) currently provides that an individual who has entered into a written agreement with the Department for "abatement of the violation" or "compliance with the unabated order" may postpone payment until receiving a final order indicating that the penalty is due or has been withdrawn. Compliance with an unabated order, however, is synonymous with the abatement of the violation. The proposed amendment to (3), therefore, deletes the two unnecessary references to "compliance with the unabated order."

17.30.2001 DEFINITIONS For purposes of ARM 17.30.2001 through ~~17.30.2006~~ 17.30.2004, the following terms have the meanings or interpretations indicated below and must be used in conjunction with and supplemental to those definitions contained in 75-5-103, MCA:

(1) through (4) remain the same.

~~(5) "Extent and gravity of the violation" means the extent of a violator's deviation from the applicable permit, authorization, rule, statute, or order. Relevant factors include concentration, volume, percentage, duration, toxicity, and the actual or potential effects of the violation on human health or state waters. Any single factor may be conclusive.~~

~~(6) "Nature of the violation" means the class to which the violation belongs as determined under (1), (2), or (3) of this rule.~~

(7) through (9) remain the same, but are renumbered (5) through (7).

AUTH: 75-5-201, MCA
IMP: 75-5-611, MCA

REASON: These amendments are necessary to make the rule consistent with New Rules I through VII.

17.30.2003 ENFORCEMENT ACTIONS FOR ADMINISTRATIVE PENALTIES (1) through (6)(b) remain the same.

(7) In lieu of the notice letter under (2), the department may issue an administrative notice together with an administrative order if the department's action:

(a) remains the same.

(b) seeks an administrative penalty only for an activity that the department believes and alleges was or is a violation of 75-5-605, MCA, and the violation was or is:

(i) remains the same.

(ii) a violation of major extent and gravity as described in ~~ARM 17.30.2006~~ [NEW RULE III].

(7) The department shall calculate a penalty in accordance with [NEW RULES I through VII].

(8) remains the same, but is renumbered (9).

AUTH: 75-5-201, MCA
IMP: 75-5-611, MCA

REASON: These amendments are proposed because ARM 17.30.2005 and 17.30.2006 are proposed for repeal and to be consistent with new rules I through VII.

17.56.121 DETERMINATION OF ADMINISTRATIVE PENALTIES

(1) remains the same.

(2) For each violation, the department shall assess ~~the maximum administrative penalty~~ a penalty as provided in [NEW RULES I through VII], and allow the time for corrective action, specified in the table in this rule. Pursuant to 75-11-525(4), MCA, the department may suspend a portion of the maximum administrative penalty based on the cooperation and degree of care exercised by the person assessed the penalty, how expeditiously the violation was corrected, and whether significant harm resulted to the public health or the environment from the violation.

The chart on pages 17-6040 and 17-6041 remains the same.

(3) and (4) remain the same.

AUTH: 75-11-505, MCA
IMP: 75-11-505, 75-11-525, MCA

REASON: The proposed amendment is necessary to comply with HB 429, which requires that penalties for violations of certain environmental laws be calculated after consideration of standardized penalty factors.

4. The rules proposed for repeal are as follows:

17.24.1212 POINT SYSTEM FOR CIVIL PENALTIES AND WAIVERS located at pages 17-2383 through 17-2385, Administrative Rules of Montana (AUTH: 82-4-204, 82-4-254, MCA; IMP: 82-4-254, MCA) is proposed for repeal because its provisions have been superceded by HB 429. The factors the Department must consider under the Strip and Underground Mine Reclamation Act in

determining a penalty are set forth in 82-4-254, MCA, as amended by HB 429 and 82-4-1001, MCA, as enacted by HB 429.

17.30.2005 FORMULA FOR DETERMINING ADMINISTRATIVE PENALTIES located at pages 17-3179 through 17-3182, Administrative Rules of Montana (AUTH: 75-5-201, MCA; IMP: 75-5-611, MCA) is proposed for repeal because its provisions have been superceded by HB 429 and new rules I through VII.

17.30.2006 EXTENT AND GRAVITY OF THE VIOLATION located at page 17-3183, Administrative Rules of Montana (AUTH: 75-5-201, MCA; IMP: 75-5-611, MCA) is proposed for repeal because its provisions have been superceded by HB 429 and new rules I through VII.

17.38.606 ADMINISTRATIVE PENALTIES located at pages 17-3673 through 17-3676, Administrative Rules of Montana (AUTH: 75-6-103, MCA; IMP: 75-6-109, MCA) is proposed for repeal because its provisions have been superceded by HB 429 and new rules I through VII.

5. The proposed new rules provide as follows:

NEW RULE I PURPOSE (1) This subchapter implements 75-1-1001 and 82-4-1001, MCA, which provide factors for calculating penalties assessed under:

(a) Title 75, chapters 2, 5, 6, 11 and 20;

(b) Title 75, chapter 10, parts 2, 4, 5 and 12;

(c) Title 76, chapter 4; and

(d) Title 82, chapter 4, parts 1, 2, 3, and 4.

(2) The purpose of the penalty calculation process is to calculate a penalty that is commensurate with the severity of the violation, that provides an adequate deterrent, and that captures the economic benefit of noncompliance.

AUTH: 75-2-111, 75-2-503, 75-5-201, 75-6-103, 75-10-204, 75-10-405, 75-10-503, 75-10-1202, 75-11-204, 75-11-505, 75-20-105, 76-4-104, 82-4-111, 82-4-204, 82-4-321, 82-4-422, MCA
IMP: 75-1-1001, 82-4-1001, MCA

REASON: In 2005 the Montana Legislature amended most of the environmental laws administered by the Department to standardize the factors that must be considered when calculating penalties for violations of those laws. Some of the environmental laws had listed factors that must be considered in penalty calculations, but the factors varied from statute to statute. Other statutes did not list any penalty factors. As a result, the Department calculated penalties using a variety of rules and penalty policies. HB 429 standardized the factors that are considered for penalty calculations for violations of environmental laws. See 75-1-1001 and 82-4-1001, MCA.

New Rules I through VII implement HB 429 by setting out the details of how the statutory penalty factor will be used in the penalty calculation process. The statute and these rules are

necessary to achieve consistent and fair penalty calculations and to increase the efficient use of enforcement staff.

NEW RULE II DEFINITIONS The following definitions apply throughout this subchapter:

(1) "Continuing violation" means a violation that involves an ongoing unlawful activity or an ongoing failure to comply with a statutory or regulatory requirement.

(2) "Extent" of the violation means the violator's degree of deviation from the applicable statute, rule or permit.

(3) "Gravity" of the violation means the degree of harm, or potential for harm, to human health or the environment, or the degree of adverse effect on the department's administration of the statute and rules.

(4) "Gross negligence" means a high degree of negligence or the absence of even slight care.

(5) "Nature" means the classification of a violation as one that harms or has the potential to harm human health or the environment or as one that adversely affects the department's administration of the statute and rules.

(6) "Ordinary negligence" means the failure to use such care as a reasonably prudent and careful person would use under similar circumstances.

AUTH: 75-2-111, 75-2-503, 75-5-201, 75-6-103, 75-10-204, 75-10-405, 75-10-503, 75-10-1202, 75-11-204, 75-11-505, 75-20-105, 76-4-104, 82-4-111, 82-4-204, 82-4-321, 82-4-422, MCA
IMP: 75-1-1001, 82-4-1001, MCA

REASON: New Rule II provides definitions of certain key terms that are used in the new rules. New Rule II is necessary to clarify the meaning of the rules and to achieve consistent and fair penalty calculations.

NEW RULE III BASE PENALTY (1) As provided in this rule, the department shall calculate the base penalty by multiplying the maximum penalty amount authorized by statute by an extent and gravity factor from the appropriate base penalty matrix in (2) or (3). In order to select a matrix from (2) or (3), the nature of the violation must first be established. The department shall classify the extent of a violation as major, moderate, or minor as provided in (4). The department shall classify the gravity of a violation as major, moderate or minor as provided in (5).

(2) The department shall use the following matrix for violations that harm or have the potential to harm human health or the environment:

	GRAVITY		
EXTENT	Major	Moderate	Minor
Major	0.70	0.60	0.50
Moderate	0.60	0.50	0.40
Minor	0.50	0.40	0.30

(3) The department shall use the following matrix for violations that adversely impact the department's administration of the applicable statute or rules, but which do not harm or have the potential to harm human health or the environment.

	GRAVITY		
EXTENT	Major	Moderate	Minor
Major	0.50	0.40	0.30
Moderate	0.40	0.30	0.20
Minor	0.30	0.20	0.10

(4) In determining the extent of a violation, the factors that the department may consider include, but are not limited to, the volume, concentration, and toxicity of the regulated substance, the severity and percent of exceedance of a regulatory limit, and the duration of the violation. The department shall determine the extent of a violation as follows:

(a) a violation has a major extent if it constitutes a major deviation from the applicable requirements;

(b) a violation has a moderate extent if it constitutes a moderate deviation from the applicable requirements;

(c) a violation has a minor extent if it constitutes a minor deviation from the applicable requirements.

(5) The department shall determine the gravity of a violation as follows:

(a) A violation has major gravity if it causes harm to human health or the environment, poses a significant potential for harm to human health or the environment, results in a release of a regulated substance, or has a significant adverse impact on the department's administration of the statute or rules. Examples of violations that may have major gravity include a release of a regulated substance without a permit or in excess of permitted limits, construction or operation without a required permit or approval, or an exceedance of a maximum contaminant level or water quality standard.

(b) A violation has moderate gravity if it:

(i) is not major or minor as provided in (a) or (c); and

(ii) poses a potential of harm to human health or the environment, or has an adverse impact on the department's administration of the statute or rules. Examples of violations that may have moderate gravity include a failure to monitor, report, or make records, a failure to report a release, leak, or bypass, a failure to construct or operate in accordance with a permit or approval, mining or disturbing land beyond a permitted boundary, or a failure to provide an adequate performance bond.

(c) A violation has minor gravity if it poses a low risk of harm to human health or the environment, or has a low adverse impact on the department's administration of the statute or rules. Examples of violations that may have minor gravity include a failure to submit a report in a timely manner, a failure to pay fees, inaccurate recordkeeping, and a failure to

comply with a minor operational requirement specified in a permit.

AUTH: 75-2-111, 75-2-503, 75-5-201, 75-6-103, 75-10-204, 75-10-405, 75-10-503, 75-10-1202, 75-11-204, 75-11-505, 75-20-105, 76-4-104, 82-4-111, 82-4-204, 82-4-321, 82-4-422, MCA
IMP: 75-1-1001, 82-4-1001, MCA

REASON: The first step in the penalty calculation process is to identify a base penalty as provided in New Rule III. The base penalty is a percentage of the statutory maximum penalty. The percentage varies depending on how the three statutory factors of "nature", "extent", and "gravity" are weighed. New Rule III defines these three statutory factors and creates two matrices for determining the base penalty. The "nature" of a violation is determined based on whether it harms or has the potential to harm human health or the environment or whether it is an administrative violation. The "extent" of a violation is determined based on a consideration of factors that include the volume, concentration, and toxicity of the regulated substance, the severity and percent of exceedance of a regulatory limit, and the duration of the violation. The "gravity" of a violation is determined based on a consideration of factors that include whether a release has occurred, the degree of risk to human health or the environment, and the extent of impact to the Department's ability to administer the statute and rules. New Rule III is necessary to clarify how these statutory factors will be implemented, and to ensure that a consistent penalty calculation process is used for all of the environmental laws subject to HB 429.

NEW RULE IV ADJUSTED BASE PENALTY - CIRCUMSTANCES, GOOD FAITH AND COOPERATION, AMOUNTS VOLUNTARILY EXPENDED (1) As provided in this rule, the department may consider circumstances, good faith and cooperation, and amounts voluntarily expended to calculate an adjusted base penalty. Circumstances may be used to increase the base penalty. Good faith and cooperation and amounts voluntarily expended may be used to decrease the base penalty. The amount of adjustment for each of the above factors is based upon a percentage of the base penalty. The amount of the adjustment is added to the base penalty to obtain an adjusted base penalty.

(2) The department may increase a base penalty by up to 30% based upon the circumstances of the violation. To determine the penalty adjustment based upon circumstances, the department shall evaluate a violator's culpability associated with the violation. In determining the amount of increase for circumstances, the department's consideration must include, but not be limited to, the following factors:

(a) how much control the violator had over the violation;

(b) the foreseeability of the violation;

(c) whether the violator took reasonable precautions to prevent the violation;

(d) the foreseeability of the impacts associated with the violation; and

(e) whether the violator knew or should have known of the requirement that was violated.

(3) The department may increase a base penalty by:

(i) 1% to 15% for ordinary negligence;

(ii) 16% to 29% for gross negligence; and

(iii) 30% for an intentional act.

(4) The department may decrease a base penalty by up to 10% based upon the violator's good faith and cooperation. The department expects that a violator will act in good faith and cooperate with the department in any situation where a violation has occurred. The department may decrease the base penalty only if the violator exhibits exceptional good faith and cooperation. In determining the amount of decrease for good faith and cooperation, the department's consideration must include, but not be limited to, the following factors:

(a) the violator's promptness in reporting and correcting the violation, and in mitigating the impacts of the violation;

(b) the extent of the violator's voluntary and full disclosure of the facts related to the violation; and

(c) the extent of the violator's assistance in the department's investigation and analysis of the violation.

(5) The department may decrease a base penalty by up to 10% based upon the amounts voluntarily expended by the violator to address or mitigate the violation or the impacts of the violation. The amount of a decrease is not required to match the amounts voluntarily expended. The department expects that a violator will expend the resources necessary to mitigate a violation or the impacts of a violation. In determining the amount of decrease for amounts voluntarily expended, the department's consideration must include, but not be limited to, the following factors:

(a) expenditures for extra resources, including personnel and equipment, to promptly mitigate the violation or impacts of the violation;

(b) expenditures, not otherwise required, of extra resources to prevent a recurrence of the violation or to eliminate the cause or source of the violation; and

(c) revenue lost by the violator due to a cessation or reduction in operations that is necessary to mitigate the violation or the impacts of the violation. This does not include revenue lost due to a cessation or reduction in operations that is required to modify or replace equipment that caused the violation.

AUTH: 75-2-111, 75-2-503, 75-5-201, 75-6-103, 75-10-204, 75-10-405, 75-10-503, 75-10-1202, 75-11-204, 75-11-505, 75-20-105, 76-4-104, 82-4-111, 82-4-204, 82-4-321, 82-4-422, MCA
IMP: 75-1-1001, 82-4-1001, MCA

REASON: New Rule IV sets out procedures for adjusting the base penalty based upon a consideration of the three statutory factors of "circumstances", "good faith and cooperation", and

"amounts voluntarily expended". New Rule IV provides for an increase to the base penalty based upon circumstances. In determining the adjustment for circumstances, the rules require a consideration of factors that reflect the culpability of the violator under the circumstances. Rule IV provides for a decrease to the base penalty based upon a consideration of certain factors that reflect the good faith and cooperation of a violator, and a decrease to the base penalty based upon certain voluntary expenditures. New Rule IV results in an adjusted base penalty. New Rule IV is necessary to clarify how these statutory factors will be implemented, and to ensure that a consistent penalty calculation process is used for all of the environmental laws subject to HB 429.

NEW RULE V TOTAL ADJUSTED PENALTY - DAYS OF VIOLATION

(1) The department may consider each day of each violation as a separate violation subject to penalties. The department may multiply the adjusted base penalty calculated under [NEW RULE IV] by the number of days of violation to obtain a total adjusted penalty.

(2) For continuing violations, if the application of (1) results in a penalty that is higher than the department believes is necessary to provide an adequate deterrent, the department may reduce the number of days of violation.

AUTH: 75-2-111, 75-2-503, 75-5-201, 75-6-103, 75-10-204, 75-10-405, 75-10-503, 75-10-1202, 75-11-204, 75-11-505, 75-20-105, 76-4-104, 82-4-111, 82-4-204, 82-4-321, 82-4-422, MCA
IMP: 75-1-1001, 82-4-1001, MCA

REASON: The environmental laws provide the Department with discretion whether and how to bring enforcement actions. Most of the laws state that each day of violation constitutes a separate violation. New Rule V clarifies that, in exercising the its statutory enforcement discretion, the Department may limit the number of days for which it assesses penalties if an assessment for the full number of violation days would result in a penalty that was higher than the department believes is necessary to provide an adequate deterrent. Under New Rule V, the adjusted base penalty calculated under New Rule IV is multiplied by the appropriate number of days to arrive at a total adjusted penalty. New Rule V is necessary to clarify how the Department will calculate the number of days of violation.

NEW RULE VI TOTAL PENALTY - HISTORY OF VIOLATION, ECONOMIC BENEFIT (1) As provided in this rule, the department may increase the total adjusted penalty based upon the violator's history of violation as defined in 75-1-1001(1)(c) and 82-4-1001(1)(c), MCA, and based upon the economic benefit that the violator gained by delaying or avoiding the cost of compliance. Any penalty increases for history of violation and economic benefit must be added to the total adjusted penalty calculated under [NEW RULE V] to obtain a total penalty.

(2) The department may calculate a separate increase for each historic violation. The amount of the increase must be calculated by multiplying the adjusted base penalty calculated under [NEW RULE IV] by the appropriate percentage from (3). This amount must then be added to the total adjusted penalty calculated under [NEW RULE V].

(3) The department shall determine the gravity of each historic violation in accordance with [NEW RULE III(5)]. The department may increase the total adjusted penalty for history of violation using the following percentages:

(a) for each historic violation with major gravity, the penalty increase may be 21% to 30% of the adjusted base penalty calculated under [NEW RULE IV];

(b) for each historic violation with moderate gravity, the penalty increase may be 11% to 20% of the adjusted base penalty calculated under [NEW RULE IV]; and

(c) for each historic violation with minor gravity, the penalty increase may be 1% to 10% of the adjusted base penalty calculated under [NEW RULE IV].

(4) If a violator has multiple historic violations and one new violation, for which a penalty is being calculated under these rules, the percentages from (3) for each historic violation must be added together. This composite percentage may not exceed 30%. The composite percentage must then be multiplied by the adjusted base penalty for the new violation to determine the amount of the increase. The increase must be added to the total adjusted penalty for the new violation calculated under [NEW RULE V].

(5) If a violator has one historic violation and multiple new violations, each with a separate penalty calculation under these rules, the adjusted base penalties for the new violations calculated under [NEW RULE IV] must be added together. This composite adjusted base penalty must then be multiplied by the percentage from (3) for the historic violation to determine the amount of the increase. The increase must then be added to the sum of the total adjusted penalties calculated for each new violation under [NEW RULE V].

(6) If a violator has multiple historic violations and multiple new violations, for which a separate penalty is being calculated under these rules, the percentages from (3) for each historic violation must be added together, not to exceed 30%, and the adjusted base penalties for each new violation calculated under [NEW RULE IV] must be added together. The composite adjusted base penalties must be multiplied by the composite percentage to determine the amount of the increase. The increase must be added to the sum of the total adjusted penalties calculated for each violation under [NEW RULE V].

(7) The department may increase the total adjusted penalty, as calculated under [NEW RULE V], by an amount based upon the violator's economic benefit. The department shall base any penalty increase for economic benefit on the department’s best estimate of the costs of compliance, based upon information reasonably available at the time it calculates a penalty under these rules. The economic benefit must be added to the total

adjusted penalty calculated under [NEW RULE V] to obtain the total penalty.

AUTH: 75-2-111, 75-2-503, 75-5-201, 75-6-103, 75-10-204, 75-10-405, 75-10-503, 75-10-1202, 75-11-204, 75-11-505, 75-20-105, 76-4-104, 82-4-111, 82-4-204, 82-4-321, 82-4-422, MCA
IMP: 75-1-1001, 82-4-1001, MCA

REASON: New Rule VI sets out the procedures for increasing the total adjusted penalty, calculated under New Rule V, based on certain qualifying prior violations. The definition of what constitutes a qualifying prior violation is set out in statute. New Rule VI provides the amount of the adjustment for prior violations, and sets out procedures for making the adjustment when there are multiple violations. Under New Rule VI, the total adjusted penalty calculated under New Rule V is adjusted for prior violations to arrive at a total penalty. New Rule VI is necessary to clarify how the Department will calculate the adjustment for prior violations.

NEW RULE VII OTHER MATTERS AS JUSTICE MAY REQUIRE

(1) The department may consider other matters as justice may require to increase or decrease the total penalty. The department may not decrease the penalty to offset the costs of correcting a violation.

AUTH: 75-2-111, 75-2-503, 75-5-201, 75-6-103, 75-10-204, 75-10-405, 75-10-503, 75-10-1202, 75-11-204, 75-11-505, 75-20-105, 76-4-104, 82-4-111, 82-4-204, 82-4-321, 82-4-422, MCA
IMP: 75-1-1001, 82-4-1001, MCA

REASON: New Rule VII provides that the Department may consider the statutory penalty factor of "other matters as justice may require" to either increase or decrease a penalty. New Rule VII does not attempt to define the scope of this factor, except by prohibiting any adjustment to offset the costs of correcting the violation. The Department expects that this factor will be used only when, based on particular facts and circumstances, the application of the factors in New Rules I through VI would result in an injustice.

6. Concerned persons may submit their data, views or arguments, either orally or in writing, at the hearings. Written data, views or arguments may also be submitted to the Board Secretary at Board of Environmental Review, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana, 59620-0901; faxed to (406) 444-4386; or emailed to ber@mt.gov, no later than 5:00 p.m., _____, 2006. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

7. _____, attorney for the Board, or another attorney for the Agency Legal Services Bureau, has been designated to preside over and conduct the hearing.

8. The Board and Department maintain a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Such written request may be mailed or delivered to the Board Secretary at Board of Environmental Review, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; emailed to ber@mt.gov; or may be made by completing a request form at any rules hearing held by the Board.

9. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

_____

JOHN F. NORTH
Rule Reviewer

BY: _____

JOSEPH W. RUSSELL, M.P.H.,
Chairman

DEPARTMENT OF ENVIRONMENTAL QUALITY

BY: _____

RICHARD H. OPPER, Director

Certified to the Secretary of State _____, 2005.